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89-1808

Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

Docket No.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JAMES WILSON, Petitioner

v.

SECURITY INSURANCE CO., Respondent

On Writ of Certiorari to the
Supreme Court of the State of Connecticut
(Docket 13618)

Part I of
Appendix to
Petition for Writ of Certiorari

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APPENDIX

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mium paid for each vehicle. If $40,000 of coverage is considered inadequate, the appropriate response is simply to buy more coverage.

There is error, the matter is remanded to the trial court with direction to vacate the judgment and to modify the arbitration award to reflect underinsured motorist coverage in the amount of $40,000.

In this opinion the other justices concurred.

JAMES WILSON *v.* SECURITY INSURANCE COMPANY
(13614)

SECURITY INSURANCE COMPANY *v.* JAMES WILSON
(13618)

PETERS, C. J., HEALEY, CALLAHAN, GLASS and COVELLO, Js.

S Co., the defendant in the first case and the plaintiff in the second case, appealed from the judgment of the trial court confirming an arbitration award to W, the plaintiff in the first case and the defendant in the second, based on the "stacking" of the $40,000 uninsured motorist coverage applicable to each of six vehicles insured under a fleet automobile liability policy issued by S Co. W cross appealed challenging the subtraction of previously paid workers' compensation benefits from the maximum available amount of uninsured motorist benefits. *Held:*

1. "Stacking" of uninsured motorist coverage is inappropriate in the context of a fleet automobile liability policy; the matter was, therefore, remanded with direction to render judgment modifying the award to reflect coverage in the amount of $40,000.
2. The trial court did not err in denying the application by W to correct the portion of the arbitrators' decision reducing the award by previously paid workers' compensation benefits; the statute (§ 38-175c) requiring automobile liability policies to provide uninsured motorist coverage contains no mandate that such benefits not be reduced.

Argued November 1, 1989—decision released January 30, 1990

Application, in the first case, to correct an arbitration award and application, in the second case, to vacate that award, brought to the Superior Court in the judicial district of New Haven, where the cases were consolidated and tried to the court, *Meadow, J.*; judgment

denying the application to correct, from which James Wilson appealed, and judgment denying the application to vacate, from which Security Insurance Company appealed and James Wilson cross appealed. *Error on the appeal, further proceedings; no error on the cross appeal.*

David M. Reilly, with whom was *Peter B. Reilly*, for the appellant-appellee (James Wilson).

Susan M. Cormier, with whom was *Wesley W. Horton*, for the appellee-appellant (Security Insurance Company).

COVELLO, J. These consolidated appeals followed a judgment of the trial court confirming an uninsured motorist arbitration award. The principal issue is whether coverage for uninsured motorists contained in a fleet automobile liability policy may be combined or "stacked" in determining the total amount of coverage available to a single claimant. We conclude that such a result is beyond the reasonable expectations of the parties to the insurance contract and that "stacking" is inappropriate in the context of fleet automobile liability policies. We therefore remand the matter to the trial court with direction to modify the award accordingly.

The relevant facts are not in dispute. On January 1, 1982, the defendant, Security Insurance Company, had in force a business automobile liability policy insuring thirty-one vehicles owned by the town of Woodbridge. The policy contained an endorsement providing uninsured motorist coverage in the amount of $40,000 for each vehicle. Each vehicle was separately listed on the policy. The policy also contained a separate schedule of premiums for each vehicle that included a $3 or $5 charge per vehicle for the $40,000 of uninsured motorist

coverage. The town paid a total of $137 for the uninsured motorist coverage on all thirty-one vehicles. The policy further contained a provision declaring that any sums payable under the uninsured motorist's endorsement to the policy would be reduced by "[a]ll sums paid or payable under any workers' compensation . . . law."

On January 1, 1982, the plaintiff, James Wilson, was a Woodbridge police officer who was assigned to operate a police car that was covered by the defendant's policy. While on duty, and while standing in the vicinity of his parked vehicle, the plaintiff was struck and severely injured by a hit and run motorist.

Unable to agree on either the amount of uninsured motorist coverage available under the defendant's policy or whether the plaintiff was even covered by the policy, the parties submitted the issues to arbitration. They stipulated that the total value of the plaintiff's claim was $350,000, that the sum of $74,033.39 had been paid in workers' compensation benefits, and that "stacking" of coverage, if applicable, was limited to the six vehicles assigned to the police department. The arbitration panel concluded that the plaintiff was a "Named Insured" under the policy and that its uninsured motorist provisions were applicable to him. The panel further concluded that, since the six vehicles were listed on the policy and a separate premium charged for each, "stacking" of the insurance coverage was proper. From the $240,000 maximum limit available (six vehicles X $40,000), the panel subtracted $74,033.39 in previously paid workers' compensation benefits. It concluded, therefore, that the plaintiff was due the sum of $165,966.61.

The defendant filed an application in Superior Court seeking to set aside the arbitration award in its entirety

pursuant to General Statutes § 52-418.[1] The plaintiff filed a separate application seeking to correct only that portion of the decision that reduced the award by the amount of the previously paid workers' compensation benefits. The trial court, *Meadow, J.*, confirmed the award in its entirety and rendered judgment denying both applications. The defendant appealed and the plaintiff cross appealed to the Appellate Court. We thereafter transferred both matters to ourselves pursuant to Practice Book § 4023.

On appeal, the defendant claims that the trial court erred in concluding: (1) the plaintiff was a "named insured" under the policy; and (2) "stacking" was permitted in the context of fleet automobile liability policies. In view of our conclusion that the trial court erred by allowing the "stacking" of the fleet automobile uninsured motorist coverage, we need not address the first issue raised.

In *Cohn* v. *Aetna Ins. Co.*, 213 Conn. 525, A.2d (1990), we examined the applicability of "stacking" principles in the context of fleet insurance contracts. We defined such a contract as "any insurance policy designated as a 'fleet' or 'garage' policy, or any insurance policy covering a number of vehicles owned by a business, a *governmental entity*, or an institution." (Emphasis added.) *Cohn* v. *Aetna Ins. Co.*, supra, 530. We concluded that "[t]he notion of 'stacking' as an objectively reasonable expectation of the parties [did] not . . . extend to fleet insurance contracts." *Cohn* v. *Aetna Ins. Co.*, supra, 530. The reason was that it was simply not credible that "a company or an

[1] General Statutes § 52-418 provides that: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any one of the following defects . . . if the arbitrators have exceeeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

employee of a company having a fleet of . . . vehicles would reasonably expect the coverage on [any one vehicle] at the time of the collision with an uninsured [or underinsured] motorist to be [a multiple of the total number of vehicles in the fleet] . . . ." *Linderer* v. *Royal Globe Ins. Co.*, 597 S.W.2d 656, 661 (Mo. App. 1980).

In the present case, the town of Woodbridge held a fleet policy insuring thirty-one vehicles. Each vehicle had uninsured motorist coverage with stated limits of $40,000. If "stacking" were permitted, $40,000 times thirty-one vehicles would produce $1,240,000 of uninsured motor vehicle coverage available for *each* vehicle. Followed to its logical conclusion, this would mean that the town of Woodbridge had purchased a total of $38,440,000 worth of uninsured motorist coverage for a premium of $137. " ' "Clearly such an expectation would not have been a reasonable one under the terms of the commercial fleet policy here in question." ' *Ohio Casualty Ins. Co.* v. *Stanfield*, 581 S.W.2d 555, 559 (Ky. 1979), quoting *Lambert* v. *Liberty Mutual Ins. Co.*, 331 So. 2d 260, 265 (Ala. 1976) . . . ." *Cohn* v. *Aetna Ins. Co.*, supra, . Even the present parties, in their unexplained stipulation limiting "stacking" principles to the six vehicles assigned to the Woodbridge police department, seemed to have sensed that the proposition is simply unsupportable when applied to large numbers of vehicles.

In his cross appeal, the plaintiff claims that the trial court erred in allowing the defendant a credit for workers' compensation benefits already paid to him in determining the amounts due under the uninsured motorist coverage. The plaintiff concedes, as he must, that the uninsured motorists' endorsement to the policy here in issue contained a specific provision reducing any amounts payable under the uninsured motorist endorsement by any sums paid under the workers' compensa-

tion laws.[2] Further, § 38-175a-6 (d) of the Regulations of Connecticut State Agencies specifically authorizes uninsured motorist benefits to be reduced by the amount of such payments.[3]

The plaintiff argues, however, that: (1) his *damages* are for pain, suffering, disability, and loss of earning capacity, none of which are recoverable under the workers' compensation laws. Therefore, his damages have not been paid and thus, no reduction in uninsured motorist coverage is required under § 38-175a-6 (d); (2) General Statutes § 38-175c, the statute requiring uninsured motorist coverage, provides a minimum limit of $20,000 for such coverage, a base amount, the plaintiff contends, which cannot be further eroded by the setoffs contained in § 38-175a-6 (d). To the extent that such setoffs exist, the plaintiff claims that the commissioner was without authority to adopt such a regulation, which is contrary to the minimum coverage required by General Statutes § 38-175c. We do not agree.

[2] The Uninsured Motorists Insurance endorsement provides under "E. OUR LIMIT OF LIABILITY" that: "Any amount payable under this insurance shall be reduced by . . . All sums paid or payable under any workers' compensation . . . law . . . ."

[3] Section 38-175a-6 of the Regulations of Connecticut State Agencies provides in relevant part: "MINIMUM PROVISION FOR PROTECTION AGAINST UNINSURED MOTORISTS . . . (d) LIMITS OF LIABILITY. The limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of § 14-112 of the general statutes, except that *the policy may provide for the reduction of limits to the extent that damages have been* (1) paid by or on behalf of any person responsible for the injury, (2) *paid or are payable under any workers' compensation or disability benefits law*, or (3) paid under the policy in settlement of a liability claim. The policy may also provide that any direct indemnity for medical expense paid or payable under the policy or any amount of any basic reparations benefits paid or payable under the policy will reduce the damages which the insured may recover under this coverage and any payment under these coverages shall reduce the company's obligation under the bodily injury liability coverage to the extent of the payment." (Emphasis added.)

We see nothing in the language of regulation § 38-175a-6 (d) that quantifies the kinds of damages that must be paid before a valid reduction in uninsured motorist benefits may occur by reason of any payments made pursuant to the workers' compensation law. If damages are paid pursuant to the workers' compensation law, the uninsured motorist coverage may be reduced accordingly. General Statutes § 38-175c contains no mandate that uninsured motorist coverage benefits may not be reduced.

As we have earlier observed, "[t]he plain words of the statute . . . [§ 38-175c] simply require that each policy provide a minimum level of uninsured motorist coverage 'for the protection of persons insured thereunder.' The statute does not require that uninsured motorist coverage be made available when the insured has been otherwise protected . . . or when the uninsured motorist has other resources available to protect the insured. Nor does the statute provide that the uninsured motorist coverage shall stand as an independent source of recovery for the insured, *or that the coverage limits shall not be reduced under appropriate circumstances.* The statute merely requires that a certain minimum level of protection be provided for those insured under automobile liability insurance policies; the insurance commissioner has been left with the task of defining those terms and conditions which will suffice to satisfy the requirement of 'protection.' " (Emphasis added.) *Roy* v. *Centennial Ins. Co.*, 171 Conn. 463, 472–73, 370 A.2d 1011 (1976).

"Section 38-175c does not specifically prohibit the adoption of a regulation permitting the reduction of uninsured motorist coverage, whereas § 38-175a explicitly authorizes the commission to adopt regulations relating 'to the insuring agreements, exclusions, conditions and other terms applicable to . . . uninsured motorists coverages.' In the construction of stat-

utes, great deference is to be accorded to the construction given the statute by the agency charged with its enforcement." *Roy* v. *Centennial Ins. Co.*, supra, 473. We are also mindful of the proposition that the legislature is presumed to be aware of the judicial construction placed upon its enactments; *Nationwide Ins. Co.* v. *Gode*, 187 Conn. 386, 395 n.7, 446 A.2d 1059 (1982); and despite our earlier observations concerning the purport of these statutes, we find no amendments that would support a contrary construction.

"The automobile liability insurance business is one which is extensively regulated; *Simonette* v. *Great American Ins. Co.*, 165 Conn. 466, 473, 338 A.2d 453 [1973]; and judicial revision of the terms upon which such policies are issued may produce extensive repercussions throughout the insurance industry of the state. In view of the very broad grant of regulatory authority to the insurance commissioner, we are not persuaded that the commissioner was without authority to adopt regulation § 38-175a-6 (d)." *Roy* v. *Centennial Ins. Co.*, supra.

There is error on the appeal and no error on the cross-appeal, the matter is remanded to the trial court with direction to vacate the judgment and to modify the arbitration award to reflect underinsured motorist coverage in the amount of $40,000.

In this opinion the other justices concurred.

Superior Court,

Judicial District of New Haven.

No.274616

James Wilson v. Security Insurance Co.

No.274461

Security Insurance Co. v. James Wilson

MEMORANDUM OF DECISION

The above recited matters are before the court on a motion to correct an arbitration award in Wilson v. Security Insurance Co., Docket Number 274616 and a motion to vacate an arbitration award in Security Insurance Co. v. Wilson, Docket number 274461.

FACTS

The two member majority of the arbitration panel in this uninsured motorist case found that on January 1, 1982, the defendant was employed by the Woodbridge Police Department. The plaintiff, the

respondent in the arbitration proceeding, had in force an insurance policy no. BA-21-50 (SAR) covering 31 vehicles owned by the Town of Woodbridge providing uninsured motorist coverage with stated limits of $40,000.00. The declaration of the policy issued was to "The Town of Woodbridge, et al."

The majority of the panel further found that the claimant Wilson was operating a police car covered by the aforesaid insurance policy. While in the performance of his duties, and while standing in the vicinity of his parked vehicle was struck and severely injured by a hit-and-run automobile.

On March 12, 1988 the plaintiff and defendant entered into arbitration under the provisions of the uninsured motorist policy pursuant to Connecticut General Statutes §38-175c and the regulations of

the Insurance Commissioner of the State of Connecticut.

The Town of Woodbridge maintained a police department. Six of the aforesaid separately insured vehicles were vehicles provided to the police department and consisted of vehicles used as cruisers by the police department. James Wilson had used all six vehicles.

At the arbitration hearing the parties stipulated that: (1) the total value of Wilson's claim is $350,000; that the sum of $74,033.39 has been paid to him or on his behalf, in workers' compensation benefits; and that stacking of coverage, it applicable, is limited to six (6) police cars, a total of $240,000.

On July 25, 1988, a majority of the arbitrators rendered a decision and issued its final award having made the following findings:

1. The work "You" in Section D.1 of the uninsured motorists endorsement includes James Wilson within the meaning of "Town of Woodbridge, et al"; and he is a Named Insured under the policy.
2. On the facts of this accident, James Wilson is entitled to recovery under the provisions of the uninsured motorists coverage.
3. Since the six police vehicles are listed on the insurance policy, and separate premiums charged for each, stacking of the insurance coverage is proper.
4. The maximum limit payable under the policy, in view of the stipulation of the parties that it is limited to six cars, is $240,000.00.
5. Under Section E.2.a of the uninsured motorists' coverage respondent is entitled to a reduction of its $240,000.00 limits of liability by the sums paid or payable under workers' compensation, which have been stipulated to be $74,033.39.
6. The value of the Wilson claim is stipulated to be $350,000.00 and is in excess of the limits of coverage available.

Two of the arbitrators agreed to award the plaintiff Wilson $165,966.61, without interest or $240,000.00 - $74,033.39). One arbitrator dissents in a separate opinion.

On August 18, 1988, Security filed an application to vacate the arbitration award asking the court to vacate the majority award and that the proceeding be remanded to the arbitrators with direction to enter an order in conformity with the dissenting award.

On August 22, 1988, the plaintiff Wilson filed an application to correct arbitration award, on the basis that the arbitrators erred as a matter of law.

No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion. Connecticut General Statutes §52-420 (rev. to 1987); Kilby v. St. Paul Ins. Co., 29 Conn. sup. 66§ 6G W§070).

On July 30, 1988, the parties were notified of the award. On August 22, 1988, the plaintiff Wilson filed an application

to correct arbitration award. On August 18, 1988, the defendant filed an application to vacate the arbitration award.

The motions to correct and to vacate, were timely filed by the parties.

Ordinarily "[A]rbitration is a creature of contract and the parties themselves, by the agreement of submission, define the powers of arbitrator." Quinn Associates, Inc. v. Borkowski 41 Conn. Sup. 17, 20 (1988). In cases where an award is challenged under Connecticut General Statutes §52-418(a)(4), as exceeding the scope of submission, the scope of judicial review is properly limited to a comparison of the award and the agreement of submission. Caldor, Inc. v. Thornton, 191 Conn. 336, 341 (1983). Furthermore, wnere the submission is deemed unrestricted, the award cannot be reviewed for errors of fact or law. See Carroll

v. Aetna Casualty & Surety Co., 189 Conn. 16, 23 (1983). The instant proceeding however does not present ordinary, contractual arbitration and the scope of judicial review is different.

The insurer in this action was compelled, by statute, to submit all issues to binding arbitration, including the issue of "stacking" fleet coverage. See Connecticut General Statutes §38-175c; Wilson v. Security Ins. Group, 199 Conn. 618, 622-24 (1986); Olivia v. Aetna Casualty & Surety Co., 181 Conn. 37, 41 (1980). The present arbitration was compulsory, not voluntary. "Where judicial review of compulsory arbitration proceedings required by §38-175c(a)1 is undertaken under Connecticut General Statutes §52-418, the reviewing court must conduct a de novo review of the interpretation and application of the law by the arbitra-

tors. The court is not bound by the limitations contractually placed on the extent of its review as in voluntary arbitration proceedings." American Universal Ins. Co. v. DelGreco, 205 Conn. 178, 191

.....omission.....

[Pages 6 to 9 containing decision on companion applications to correct filed by Wilson omitted as not relevant to federal issues] [Page 10]:

II

Motion to Vacate

Connecticut General Statutes §42-418 provides that the court shall vacate the arbitrator's award if it finds one of the four defects:

> (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of an arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been preju-

> diced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The movant, Security, claims that the majority erred as a matter of law in concluding that under the provision of the policy in question: (1) James Wilson is a named insured and (2) the stacking of coverage is proper.

A. Named Insured

The movant relying upon Testone v. Allstate Insurance Co., 165 Conn. 126 (1973), argues that Wilson is not a named insured in the policy. In Testone, the Supreme Court reversed the trial court's conclusion that the plaintiff was either a named or designated insured under the policy. There, the only named insured of the policy was the employer Joe's Service Station, Inc. There were no other designated insureds. The court in Testone reasoned as follows:

> "The mere fact that the plaintiff was acting within the scope of his employment at the time he was injured, while affording him remedies and rights under Workmens' Compensation Act does not transform him into a named insured or designated insured as defined under the uninsured motorist coverage of his employer's insurance policy.

Testone, at 130.

The policy in this action differs from the policy in Testone. The policy in question reads in pertinent part:

In Part I:

> "The following words and phrases have special meaning throughout this policy and appear in boldface type when used:
> A. "You" and "your" mean the person or organization shown as the named insured in ITEM ONE of the declarations.
> B. "We", "us" and "our" mean the company providing the insurance...
> F. "Insured" means any person or organization qualifying as an insured in the WHO IS INSURED section of the applicable insurance. Except with respect to our limit of liability, the insurance afforded applies separately to each insured who is seeking coverage or against whom a claim is made or suit is brought.

In Part V:

"D. WHO IS INSURED.
1. You are an insured for any covered auto.
2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except:
a. The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.
b. Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos unless that business is yours.
c. Anyone other than your employees, a leasee or borrower or any of their employees, while moving property to or from a covered auto.
3. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own."

An endorsement included in the policy states:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

EMPLOYEES AS INSUREDS

The following is added to WHO IS INSURED.

Any Includes in definition or employee Member of the Commission on Aging & Volunteers of that Commission employee of yours is an insured while using a covered auto you don't own, hire or borrow which is used in your business or your personal affairs.

The policy discloses that employees are designated as insureds. Wilson as an employee was a designated insured under the policy.

There is no "named insured section" of the policy. The sections of the policy actually referred to in the policy definitions are contained in the "Declarations" Section. The terms "you" in the policy definitions require examination of what is shown in portions of the policy identi-

fied as the Declarations. None of the endorsements purport to amend or change what is "shown" in the Declarations. The words "the Town of Woodbridge, et al" are "shown" in the Declarations.

The other endorsements are relevant to show reasonable expectation of the parties. The arbitrator finding that Wilson was an employee of the Town of Woodbridge under the Declarations is reasonable. The endorsement did not limit the Declaration but only included others.

The arbitrators found in the broadly stated language of the policy under the facts of the accident that Wilson was entitled to coverage.

The Security Insurance Company admitted in oral argument that Wilson had submitted evidence to the arbitrators that Wilson was in the process of taking a woman he had placed under arrest to place

her in a covered vehicle to prepare his report.

The Security Insurance Company object to Wilson's offer of proof of the uncontroverted evidence before this arbitrators that Wilson was loading a covered vehicle.

The Security Insurance Company offered no record to this court that the findings of the arbitrators was not supported by the evidence.

The Security Insurance Company by its objection to the offer of proof by Wilson confined the proceedings before this court on the record yet offered no proof by the record before the arbitrators to reject their findings.

The Security Insurance Company sought judicial review of the proceedings before the arbitrators.

The plaintiff cannot cause injury to an

insured who presented undisputed uncontrovertable proof that under the facts of the case existing required coverage under the statutes and regulations.

The arbitrators found under the facts the insured was entitled to coverage.

The plaintiff has the burden of proof to show that it was injured. By the record presented the plaintiff has failed to demonstrate such burden. The plaintiff did not prove that the arbitrators found that Wilson was not loading or not using a covered vehicle.

B. Stacking

The Security Insurance Company contends that the majority of the arbitrators erred as a matter of law in concluding that Wilson was entitled to stack coverage of six vehicles insured under this fleet policy to obtain a maximum limit of $240,000.00.

Connecticut courts have consistently allowed the stacking of insurance coverage. See e.g., Allstate Ins. Co., v. Ferrante, 201 Conn. 478, 482 (1986); Dixon v. Empire Mutual Ins. Co., 189 Conn. 449 (1983); Nationwide Ins. Co. v. Gode, 187 Conn 386, 396-97 (1982); Safeco Ins. Co. v. Vetre, 174 Conn 329, 330 (1974); Veal v. Aetna Casualty & Surety Co., 39 Conn. Sup. 90, 94-95 (Super. Ct. 1983).

Accordingly motion to vacate is denied.

Frank S. Meadow, Judge

IN ARBITRATION

FINDING AND AWARD

On January 1, 1982, respondent had in force a insurance auto policy no. BA 85-21-50 (SAR), covering 31 vehicles owned by the Town of Woodbridge. The policy was issued to "The Town of Woodbridge, et al," and contained endorsement CA 2 x 17, providing uninsured motorists coverage with stated limits of $40,000.00

On said date, claimant Wilson was a Woodbridge police officer, operating a police car covered by the aforesaid insurance policy. While in the performance of his duties, and while standing in the vicinity of his parked vehicle, he was struck and severely injured by a hit-and-run-automobile.

The parties have stipulated that the total value of Wilson's claim is

$350,000.00; that the sum of $74,033.39 has been paid to him, or on his behalf, in worker's compensation benefits; and that stacking of coverage, if applicable, is limited to six (6) police cars, a total of $240,000.

By majority vote, the arbitrators make the following findings:

1. The word "You" in Section D.1 of the uninsured motorists endorsement includes James Wilson within the meaning of "Town of Woodbridge, et al"; and he is a Named Insured under the policy.
2. On the facts of this accident, James Wilson is entitled to recovery under the provisions of the uninsured motorists coverage.
3. Since the six police vehicles are listed on the insurance policy, and separate premiums charged for each,

stacking of the insurance coverage is proper.

4. The maximum limit payable under the policy, in view of the stipulation of the parties that it is limited to six cars, is $240,000.

5. Under Section E.2.a. of the uninsured motorists' coverage, respondent is entitled to a reduction of its $240,000 limits of liability by the sums paid or payable under workers compensation, which have been stipulated to be $74,033.39.

6. The value of the Wilson claim is stipulated to be $350,000 and is in excess of the limits of coverage available.

AWARD

In view of the foregoing, the respondent is directed to pay to claimant the sum of $165,966.61, without interest.

Arbitrator John Lemega dissents in a separate opinion.

Richard Bieder
George E. McGoldrick

ARBITRATION

DISSENT

In its award in favor of the claimant, the majority of this panel concluded that, at the time of the hit-and-run accident which resulted in the claimant's concededly serious injuries, the claimant was a "named insured" under the business auto policy which the respondent had issued to the claimant's employer, the Town of Woodbridge. I would respectfully suggest that this conclusion is clearly and patently in error.

The operative facts of this case are relatively straightforward. In the early morning hours of January 1, 1982, the claimant, James E. Wilson, then in the course of his employment as a Woodbridge police officer, was struck by a hit-and-run motorist and sustained serious bodily

injury. At the time of the accident, Wilson was in the process of taking into custody and/or interrogating a young woman whom he and his partner had apprehended. Although he had driven a Woodbridge police cruiser to the scene of the accident, when he was struck he was not occupying the vehicle and was, in fact, a pedestrian.

At the time of the accident, the police vehicle, which he had driven to the scene and from which he had exited prior to being struck, was amount some 29 vehicles which were insured under a business auto policy which the respondent had issued to the Town of Woodbridge. That policy identified as named insured the following entities: TOWN OF WOODBRIDGE and each of its duly constituted boards and commissions, THE BOARD OF EDUCATION, and THE WOODBRIDGE FIRE ASSOCIATION, INC."

That insurance policy also provided uninsured motorist coverage. That coverage obligated the respondent to "pay all sums the insured is legally entitled to recover as damages from the owner or driver of an uninsured motor vehicle." In defining "Who Is Insured" under this coverage, the policy provided:

> D. WHO IS INSURED
> 1. You or any family member.
> 2. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.
> 3. Anyone for damages he is entitled to recover because of bodily injury sustained by another insured.

The policy defines "you" to mean "the person or organization shown as the named insured in Item One of the declarations." It further defines "family member" to mean "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child."

Against the background of these policy provisions, the majority of this panel apparently construed the phrase"you or nay family member" as ambiguous in light of the fact that the policy identified as named insureds ("you") certain municipal and corporate entities. Because the phrase "you or any family member" would appear to be out of place in a business auto policy, the majority seeks to resolve this so-called "ambiguity" against the respondent and in favor of the extension of coverage to the claimant.

The threshold problem with this conclusion is that it files directly in the face of the Supreme Court's decision in Testone v. Allstate Ins. Co., 165 Conn. 126 (1973). In Testone, the plaintiff had driven a wrecker owned by his employer, Joe's Service Station, Inc. to the site of an accident. While out of

that vehicle and working on another vehicle which had been involved in that prior accident, the plaintiff was struck by an uninsured motorist. The plaintiff then asserted an uninsured motorist claim under the policy covering the wrecker. THat policy provided for uninsured motorist coverage to "(a) the named insured and any designated insured and while residents of the same household, the spouse and relative of either; (b) any other person while occupying an insured highway vehicle." Id. at 129. The trial court concluded that because at the time of the accident the plaintiff was an employee of Joe's Service Station, Inc. and had been using the wrecker within the scope of his employment, he was either a named insured or a designated insured under the policy.

The Supreme Court rejected the trial court's conclusion and stated:

> The mere fact that the plaintiff was acting within the scope of his employment at the time he was injured, while affording him remedies and rights under the Workmen's Compensation Act, does not transform him into a named insured or a designated insured as defined under the uninsured motorist coverage of his employer's insurance policy.

Id. at 130. It seems to me that both factually and legally the Testone decision should control the instant case and I am at a loss to understand how the majority of this panel can so blithely ignore such established legal precedent.

Indeed, in apparently seeking to characterize the phrase "you or any family member" as ambiguous because it appears in a business auto policy which lists only municipal and corporate entities as the "named insureds," the majority has in fact sought to reform the policy. That there are no members of the class of insureds described as "you or any family member" in the context of this business

auto policy does not transform this phrase into an ambiguity. The words are explicit and the meaning is clear. The phrase simply becomes a nullity. Sears v. Wilson, 704 P.2d 389, 392 (Kan. Ct. App. 1985).

Nor is the Connecticut Supreme Court alone in eschewing the importation of an artificial ambiguity into this policy language. Courts in other jurisdictions are essentially unanimous in agreeing with the Testone construction of this policy language. see Buckner v. MVAIC, 486 N.E.2d 810, 811 (N.Y. 1985); Sears v. Wilson, supra at 390; Pearcy v. Travelers Indemnity Co., 429 So.2d 1298 (Fla. Dis. App.), rev. den. 438 So.2d 833 (Fla. 1983); Dixon v. Gunter, 636 S.W.2d 437, 441 (Tenn. App. 1982); General Insurance v. Icelandic Builders, 604 P.2d 966 (Wash. App. 1979) there is simply no le-

gal basis by which the majority can justify its transmogrification of the claimant into a "named insured" under the respondent's policy. Guarantee Ins. Co. v. Anderson, 585 F.Sup. 408, 411 (E.D. Pa. 1984).

The claimant is not entitled to uninsured motorist coverage under the respondent's policy. Accordingly, I dissent.

John W. Lemega, Arbitrator

APPLICATION TO VACATE ARBITRATION AWARD

To the Superior Court, within and for the Judicial District of New Haven, now in session, comes Security Insurance Group, a/k/a Orion Group, Inc., the Plaintiff seeking an order vacating a certain Arbitration Award involving matters between the Defendant James Wilson and the Plaintiff Security Insurance Group, a/k/a Orion Group, Inc., and complains and says:

1.Pursuant to C.G.S. §38-175c, Policy No. BA 852150 (SAR) and its Amendatory Endorsements, the Plaintiff and the Defendant submitted to arbitration their dispute regarding the uninsured motorist insurance issued to the Defendant's employer, Town of Woodbridge by the Plaintiff. A copy of the declaration, policy and endorsements are attached as Exhibit A.

2.On July 25, 1988, two of the three arbitrators made written award, which the Plaintiff received on August 1, 1988. A copy of that award is attached as Exhibit B.

3.On July 22, 1988, arbitrator John W. Lemega dissented from the majority award. That dissent was included with the award and received by the Plaintiff on August 1, 1988. A copy of the dissent is attached as Exhibit C.

4.Plaintiff Security Insurance Group, a/k/a Orion Group moves the Court to vacate the majority award for the reason that said award was based on an erroneous interpretation of Connecticut law and therefore exceeded the arbitrators' powers.

WHEREFORE, the Plaintiff prays:

1.That the majority award be vacated and that the proceeding be remanded to the arbitrators with direction to enter an order in conformity with the dissenting award.

2.That the Defendant be ordered to appear on a day certain to show cause, if

any it has, why this Application should not be granted.

Dated at Hartford, Connecticut, this 18th day of August, 1988.

PLAINTIFF, SECURITY INSURANCE GROUP
a/k/a ORION GROUP, INC.

By_____
Susan M. Cormier
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, CT. 06105

STATE OF CONNECTICUT
SUPREME COURT
NO. 13618

SECURITY INSURANCE COMPANY
V.
JAMES WILSON
February 21, 1990

O R D E R

THE MOTION OF THE DEFENDANT, FILED FEBRUARY 8, 1990, FOR REARGUMENT AND RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT,

IT IS HEREBY ORDERED DENIED.

BY THE COURT

/s/ Michele T. Angers

FIRST ASSISTANT CLERK-
APPELLATE

Exerpts from Wilson Brief to Connecticut Supreme Court.

[From page 4]:

Security's theory of the case on its Motion To Vacate was that no proof of evidence before the arbitrators was relevant and no other proof was admissible.

Security elected to proceed without proof of the record before the arbitrators apart from the exhibits attached to its Motion to Vacate. Transcript 9,14,-15,20,22,27. Appendix pp1-5.

At trial, Wilson claimed there was evidence before the arbitrators that Wilson was a user of the vehicle, and was loading it, supporting their second finding. Objections to Wilson's offer to submit proof of such evidence were sustained. Transcript pp 9,20,30,35,82. Appendix pp 1-5. Exceptions taken, Tr. pp 56,57. Constitutional grounds were asserted un-

der the due process clauses of the 5th and 14th Amendments to the Constitution of the United States, and under the provision of Section 10 of the Constitution of Connecticut.

In its memorandum of decision, the trial court decided coverage issues raised by the Security on the Motion to Vacate, assuming the facts claimed by Wilson appeared in the record before the panel absent tender of proof to the contrary from Security, which had the burden of proof on the Motion To Vacate.

.....

[Wilson Brief, pg 22 et seq]:

PART IV

THE SECURITY FAILED TO MEET ITS BURDEN OF PROOF IN THE TRIAL COURT.

The legislature has placed the jurisdiction to hear and decide coverage issues in the arbitrators. The function of the

court is to provide review, and not to undertake "trial" de novo. The scope of "de novo review" is first discussed in Holley v. Sunderland, 110 Conn. 80, at 83. The test of all administrative decisions in the courts is by the standard of "de novo review".

Reviewing court may review the record where challenge is made to the inadequacy of the statements of the tribunal; the decision of an arbitration panel ought not be overturned if the decision below is reasonably supported by the evidence heard by the arbitrators. Stankiewicz v. Zoning Board of Appeals, 211 Conn. 76. This applies to both grounds of Security's appeal.

It is not the function of this court to retry the case. The bounds of judicial review are limited. Burnham v Planning & Zoning, 189 Conn. 261, at 266 (bottom)

The burden is on the person moving to vacate. 5 Am. Jur 2d 657, Arb. & Awards §186, fn 7. Overseas Private Investment Corp. v Anaconda Co., (D.C. Dist. Col.) 418 F.Supp. 107.

It is presumed that all issues submitted to the arbitrator for decision have been passed upon and resolved and the burden of proving otherwise is upon the party challenging the awards. Rodriques v Keller, 113 Cal. App. 3rd 838., 170 Cal. Rptr. 349. (Cited: Wilson v Security Ins. Co., 199 Conn. 618, 630).

Similarly, when a jury verdict has been rendered for the defendant, the presumption is that all issues were found for defendant. Kosko v Kohler, 176 Conn. 383, 385.

Where two or more distinct defenses exist, a general verdict will be sustained if it can be supported on the ba-

sis of one of them. Kosko v Kohler, 176 Conn. 383, 385.

A general verdict for a party must stand where one of two or three grounds support a general verdict. Franks v Lockwood, 146 Conn. 273 at 279.

The standard to be applied when reviewing a compulsory arbitration award which is alleged to be infected by error of law is whether any rational basis exists for the determination. (Compulsory arbitration award upheld, where decision questionable but not so irrational as to require vacatur.). Shand v Aetna Ins. Co. (1980) 74 A.D. 2d 442, 428 NYS 2d 462. (Decision subsequent to Mount St. Mary Hospital v Catherwood, 26 NY 2d 493, 260 N.E. 2d 508 which decision was cited in Wilson v Security, 199 Conn. 618 at 629).

The standard adopted in Detroit Auto,

Inter-Ins. Exchange v Gavin, 331 N.W.2d 418 (Mich. 1982) (Cited: Wilson v Security, 199 Conn. at p. 629) is to the same effect. The formulation adopted would require the reviewing court to find that "but for" an error a substantially different award must have been made. 331 N.W.2d at 434, top. Any award having a basis in two separate and distinct theories must stand if an error appears only as to one claim.

Every reasonable intendment is indulged to give effect to the award. 5 Am. Jur. 2d 656, Arb. & Award §185, fn 14 Citing: Straus v North Hollywood Hospital, 150 Cal. App. 2d 306, 309 P. 2d 541; VonLangendorff v Riordan, 147 Conn. 524; Cusano v Dunn, 137 Conn. 20, 24; Strain v. Mims, 123 Conn. 275, 285.

There are no presumptions known to the law that assist the Security which has the burden of proof.

The burden of proof is affected by the fact that a policy of insurance is a contract of adhesion. Aetna Casualty & Surety Co. v. Murphy, 206 Conn. 409, 415, bottom. Questions of fact are at issue. Contracts, by John D. Calamari & Joseph M. Perillo (Hornbook Series) 1977. at pg 337, Fairfield Lease Corporation v Romano's Auto Service, 4 Conn. App. 495 at 498-499. As a contract of adhesion existed, it is relevant that the provisions of the Uninsured Motorist Coverage had been construed by the courts of Connecticut and stacking had been allowed, that Security had selected a form compatible for use with a family automobile policy, that Security as the party seeking to enforce a construction contrary to the prior decisions of this court. It had the burden of showing that the provisions were explained to the other party to the

contract, and came to his knowledge and that there was in fact a real meeting of the minds and not merely an objective meeting. Contracts, by John D. Calamari & Joseph M. Perillo (Hornbook Series) 1977. at pg 337. Since the intent and effect of §38-175c (a) (1) was "to remove from the court and to transfer to the arbitration panel the function of determining, in the first instance, all issues as to coverage under automobile liability insurance policies containing uninsured motorist clauses providing for arbitration" (Lane v. Aetna Cas. & Surety Co., 203 Conn. 258 at 263) the Security abandoned its position by failing to offer proof of the proceedings before the arbitration panel.

Absent proof that the parties actually understood that a result contrary to Ferrante was intended, the arbitrators were

entitled to apply the law of Ferrante to the contract so similarly constructed.

Since the the first conclusion of Arbitration panel was the "et al" provision was broad enough to cover Wilson, the state of the facts before the panel was relevant upon review. No meeting of the minds to the contrary is claimed to have been proven by Security. Rights of employees had clearly been the subject matter of coverage in the negotiations for coverage, otherwise the endorsements would not appear.

Security did not prove the second paragraph of the findings of the Arbitrators commencing "On the facts of this accident .." was not supported by the record before the arbitrators. This justifies the conclusion that the evidence was sufficient at their hearing to justify their conclusion. Security did not prove that

the arbitrators found Wilson was not loading.

Since Wilson's useage of the vehicle qualified him for liability coverage, the evidence concerning that useage was relevant to the propriety of the decision of the arbitrators.

If he had liability coverage, he was insured for uninsured motorist coverage.

Since the presumptions are that the arbitrators' decision was proper, the burden to show on the facts that the decision could not be reached was upon the Security. Security fails because it did not show the record upon which the decision was reached.

The purpose of the decision in Wilson v Security 199 Conn. 618 is to protect constitutional rights of parties in compulsory arbitration from injury done to a party in his property. Wilson, 199 Conn.

at 628. Protection from arbitrators who disregard the law was sought by Security in its 1985 appeal. Fair procedures for review were sought. The Supreme Court agreed - see American Universal v Del-Greco, 205 Conn. 178, at 189. At the time the Security Insurance Company came into this court, took a position at trial that Wilson had no right to show the true state of facts before the arbitrators. By its objections in Superior Court, Security has voluntarily caused the review proceedings to be confined to a record consisting only of the Insurance Company's petition, its policy and the decision. The Security submitted no proof of the proceedings before the arbitrators. The Security seeking to have the majority opinion construed in the light of the dissenting arbitrator's limited statement by innuendo.

We quote from American Universal Ins.Co. v DelGreco at 191:

"Thus a standard of judicial review of compulsory arbitration on proceedings which is limited to the record and under which the reviewing court may determine only whether the award conforms to the submission, would in most cases be the equivalent of no review at all and would be constitutionally suspect. Something more is required.

The Security cannot constitutionally prevail upon the record it presents for review. Something more was required.

The Security had the right to join issue on the content of the the evidence before the arbitrators even if no transcript existed. The Morama Corporation v. Town Council of West Hartford, 146 Conn. 588; Tarasovic v. Zoning Commission, 147 Conn. 65 at 69.

Having sought and having succeeded in obtaining a right to judicial review of the proceedings before the arbitrators, the insurance company must respect the constitutional rights of Wilson and so must the court.

Wilson asserts his Constitutional rights as set forth in American Universal v DelGreco, 205 Conn. at 189:

1.) Not to be deprived of property and liberty of contract without due process of law under State and Federal constitution; 2.) A right to jury trial and/or the State's constitutional access to the courts provisions; 3. A right to challenge unconstitutional delegations of legislative or judicial power in violation of the State's separation of powers provisions.

The party who seeks equity must grant equity. The Security sought equitable

right to judicial review which was not limited to a bare record and sought protection from injury when it previously brought its claims to the Supreme Court.

The Security insurance company cannot cause injury to an insured who presented undisputed, uncontrovertable proof that the state of facts existing required coverage under the mandate of the statutes and regulations and who received the award of arbitrators who found that under the facts presented the insured was entitled to coverage, by creating artificial standards for review which eliminate Wilson's right to deny Security's unproven claims of injury. Upon the record the insurance company has presented, it would be an unfair, unjust, unconstitutional result if Security were to prevail.

The Security by proceeding to arbitration without a stenographer waived the right to a stenographer.

The Security cannot attempt to switch the burden of proof to Wilson and simultaneously object to offers of proof which show the award was required in fact and in law. Security has the burden of proving its claims of injury. If the uncontroverted facts before the arbitrators did not demand recovery by Wilson, it was their burden to prove an injury.

The Security cannot cause injury to Wilson by invoking procedures that would assume injury occurred to Security in the absence of proof.

Before the decision in Wilson v Security Insurance, 199 Conn. 618, the award of the arbitrators was final and binding. See American Motorists Ins. v. Brookman, 1 Conn. App. 219, 470 A2d 253.

The legislature provided that the jurisdiction for hearing and deciding the coverage issues would be placed with arbitrators if the insurance carrier voluntarily elected to include an arbitration clause in its policy to provide for resolution of other disputes concerning Uninsured Motorist Coverage. This insurance company did not see fit to prescribe the scope of judicial review of any issue submitted to arbitrators. It did not by contract prescribe the procedures which were to be followed in seeking judicial review. The policy written does not impose any burden upon the insured in the judicial review process when the insurance company moves to vacate an unfavorable award. Since the policy must be construed against the company and the terms of the policy place no burden upon Wilson in this process and the policy

does not require the arbitrators to state all of their findings and does not require them to detail and make specific each finding of fact, the Security's claims must fail.

The Security did not prove injury in the constitutional sense because the Security did not prove that on the evidence heard by arbitrators their decision was unreasonable or against the law. The Security did not prove that the arbitrators found that Wilson was not loading or not using. Indeed, had they so found, such a decision would have been legally unreasonable as against the uncontrovertable evidence heard by them. The duty to prove injury placed a greater burden upon the petitioner.

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[Wilson Brief to Connecticut Supreme Court, page 31, et seq]:

PART VI Cross Appeal, Docket 13614.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION TO DISMISS THE MOTION TO VACATE AND IN FAILING TO SUSTAIN THE OBJECTION TO MOTION TO VACATE.

In the motion to vacate, the grounds must appear. Harris v Social Mfg. Co., 8 R.I. 133; Block v Woodruff, 193 Ala. 327,67 So. 97; Gould v Atchison T & SF RR Co., 57 Kan. 70, 45 P. 82; Second Soc. of Universalists v Royal Ins. Co., 221 Mass. 518, 109 NE 384.

The motion to vacate set forth no facts and no grounds for the relief asked for in the motion. Practice Book Form 604.17 calls for the application to set forth facts and reasons in support of the application. Pleadings which do not contain supporting facts are legally insufficient. Smith v. Furness, 117 Conn. 97. The fundamental purpose of pleading is to acquaint the opposite party with the pre-

cise claim to be made. Santo v Maynard, 57 Conn. 157; Board of Education, Norwalk v Commission on Human Rights & Opportunities 177 Conn. 75; Biller v Harris, 147 Conn. 351 at 355-8; Farrell v St. Vincents Hospital, 203 Conn. 554, 557; Frances v Hollaner, 1 Conn. App. 693, 694-5 The motion to vacate did not allege that the arbitrators had no evidence or proof that Wilson was within the mandated coverage for employees. The petition did not allege Wilson was not using a covered vehicle. The petition did not allege that the arbitrators had no basis for finding that Wilson was covered on the facts presented to the arbitrators. The petition did not allege that under the facts of the accident and proof that a controversy as to use of the vehicle legally existed. The motion to vacate did not allege that the Security had pre-

sented evidence before the arbitrators that the parties to the contract of insurance had in fact reached agreement with actual meeting of the minds contrary to the conclusions of the arbitrators. It is fundamentally unfair to allow the Security to proceed on record so devoid of notice to its opponent

In other proceedings, such as appeals taken to this court, the appellant is obliged to set forth the grounds for appeal at the outset by filing assignments of error, and by failing to do so, the claims not assigned are waived and abandoned. P.B. §4013. Board of Police Commissioners v White 171 Conn. 553 at 556-7. Lewin & Sons v Framularo, 159 Conn. 611. McGaffin v Roberts, 193 Conn. 393 at 399, fn.6: "Groundless assignments of error are not to be countenanced." See: Barrett v Central Vt. Ry. Inc., 2 Conn.

App. 530, 535. (i.e. assignment of error that give no specifics and state no grounds).

In arbitration proceedings the common law places the burden of designating the issues upon the plaintiff who must plead and prove the alleged cause of its grievance. 5 Am.Jur.2d 656, Arbitration and Award §186. Under our practice, a date for nearing is set when the order to show cause is issued.

In the constitutional sense, due process of law requires notice sufficient to permit preparation. Specific issues must be identified. In Re Gault, 387 U.S. 1, 18 L.Ed. 2d 527 at 549-550; Armstrong v Manzo, (1965), 380 U.S. 545, 14 L.Ed. 2d 62, 85 S.Ct. 1187. This rule was adopted by the state of Connecticut on constitutional grounds: Osterlund v State, 129 Conn. 591, 596, Syllabus ¶5.

It is a fundamental premise of due process that a court cannot adjudicate a matter until the persons directly concerned have been notified of its pendency and have been given a reasonable opportunity to be heard in sufficient time to prepare their positions on the issues involved. Costello v Costello, 186 Conn. 773 at 776-7. Winick v Winick, 153 Conn. 294, at 297-299.

No grounds for vacating the award appear in the motion.

Grounds not set forth are abandoned. Trumbull v. Trumbull Police Local 1745. 1 Conn. App. 207, 216.

The distinction between a defective statement of a cause of action and a statement of a defective cause of action has always been of importance. Vickery v. New London Northern R. Co., 87 Conn. 634. 61A Am. Jur. 2d 20, 21; Pleading §3, §4.

A pleading which sets forth no grounds is constitutionally unacceptable. It is a nullity.

The importance of a proper filing at the outset is made most important in this matter since it is not a civil action. Waterbury v. Waterbury Police Union, 176 Conn. 401 at 408, (which held the statutes in title 52 of the general statutes did not apply to special proceedings.) c.f.: Bank Building Equipment Co. v. Architectural Examining Board, 153 Conn. 121, Carbone v. Zoning Board of Appeals, 126 Conn. 602. In a special proceeding such as here, a plaintiff has no right to amend. The defendant has no right to seek revision, no right to discovery, and no right to seek admissions for the record. Under date of September 8, 1988, Security filed Objections to the Requests to Admit previously filed by Wilson on

the basis that this special proceeding did not allow discovery, and was not a civil action. The requests to admit sought in part concessions as to what constituted the record before the arbitrators.

This court has held that a probate appeal defective on its face may not be cured by amendment. Maloney v Taplin, 154 Conn. 247, 248. (Written appeal limits scope of appeal; Fatal omission cannot be corrected);

Although Wilson has, after urging dismissal, gone on to address the merits of Security's claims, he should not be penalized for his caution in doing so. He is entitled to insist upon compliance with due process of law. See: Barrett v Central Vt. Ry. Inc., supra, 2 Conn. App. 530, at 536.